Filed 6/17/19 Fisher v. Channing CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PERRY DON FISHER, Plaintiff and Appellant, v. BURT CHANNING, Defendant and Respondent,	B292689 (Los Angeles County Super. Ct. No. BC666175)

APPEAL from judgment of the Superior Court of Los Angeles County, Patricia Nieto, Judge. Affirmed.

Peter Borenstein for Plaintiff and Appellant.

Richard S. Klein for Defendant and Respondent.

INTRODUCTION

In 1978 Perry Don Fisher sustained a serious work-related injury. In 1984 Fisher's attorney, Burt Channing, settled Fisher's workers' compensation action for $67,000. Fisher claims he received $4,000 of the $67,000 and asked Channing to hold the rest of it in trust.

In 1991 Fisher was sentenced to a prison term of 16 years to life for second degree murder. At that time, and again in 1993, Fisher called and wrote letters asking Channing to transfer the balance of the workers' compensation settlement proceeds to Fisher's commissary account at the prison or to a bank. Channing never responded.

On June 23, 2017, after Fisher was paroled from prison, he filed this action against Channing for conversion, professional negligence, and breach of fiduciary duty. The trial court granted Channing's motion for summary judgment, ruling Fisher's action was barred by the statute of limitations. We affirm.

FACTUAL AND BACKGROUND FACTS

When Fisher was 14 years old, he moved out of his mother's house and began living on the streets. He stopped going to school in the eighth grade. To support himself, Fisher committed petty crimes.

Fisher got a job in 1978 with a moving and trucking company. In March of that year, however, he was involved in a serious work-related trucking accident, suffering a broken right femur and a serious injury to his right arm. After several surgeries, Fisher walked with crutches for eight months.

By 1979 Fisher was addicted to pain killers and later became addicted to cocaine and PCP. To support his addiction, he began selling drugs. Although Fisher occasionally returned home, his mother kicked him out because he was abusing drugs.

On March 7, 1980 Fisher, represented by attorney Ulysses Cook, filed a workers' compensation lawsuit for the injuries he sustained in the 1978 accident. On May 26, 1983 Channing associated in as counsel of record.

In 1984 Channing settled Fisher's case for $67,000. Because Fisher was homeless, Channing sent a postcard to the residence of Fisher's mother asking Fisher to contact him as soon as possible. In July 1985 Fisher went to Channing's office and received his share of the settlement money. The parties dispute whether Channing paid Fisher the entire amount or whether Fisher asked Channing to give him $4,000 and keep the rest of the proceeds in trust.[1] This was the last time Fisher spoke with Channing.

On March 14, 1991 Fisher was charged with second degree murder in connection with a drug deal. The jury convicted him, and the court sentenced him to a prison term of 16 years to life.

In 1991 and 1993 Fisher wrote Channing "a lot" of letters asking Channing to "transfer the remaining settlement amount to [him,] either to [his] prison commissary account or to an

---

[1] Fisher claims he only took $4,000 because, had he received the entire amount, he would have either bought "a kilogram of cocaine and style[d himself] as a drug kingpin" or he would have "blow[n] it all on drugs . . . and perhaps die[d] of an overdose." Fisher also claims he had no place to put the money, did not have identification, and had no experience with banks.

outside bank account."[2] The letters were never returned, and Fisher never received any responses to the letters. Fisher also called Channing "numerous times," but the phone number was disconnected. Fisher stated that, had he reached Channing, his "intention was only to request that he send me the balance of [his] client trust account in prison." Fisher stated he "did not believe that [he] needed to sue Mr. Channing to recover [his] share of the settlement." Channing retired in 1999 and moved to South Carolina.

In 2013, with the help of a "jailhouse lawyer," Fisher sent two letters to Cook "asking that he or Mr. Channing close my client trust account and send me a check for the remaining balance." Fisher never received a reply from Cook, who had died in 1998.

On April 7, 2016 Fisher was released from prison. Days later, he went to the office where he last saw Channing in 1985. By then, however, Channing was no longer at that location, and no one in the building knew who or where Channing was.

On June 23, 2017 Fisher filed this action against Channing. In addition to denying Fisher's allegations, Channing alleged that Fisher's complaint was barred by the statute of limitations and laches and that the purported obligation was paid in full.

The trial court granted Channing's motion for summary judgment. The trial court ruled that each of Fisher's three causes of action was barred by the applicable statute of limitations. The trial court entered judgment that same day, and Fisher timely appealed.

---

[2] Fisher did not retain copies of the letters.

DISCUSSION

A. *Standard of Review*

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)[3] We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477; see *Fernandez v. Alexander* (2019) 31 Cal.App.5th 770, 778; *Schmidt v. Citibank, N.A.* (2018) 28 Cal.App.5th 1109, 1119.) A triable issue of material fact exists where "'the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.'" (*Duffey v. Tender Heart Home Care Agency, LLC* (2019) 31 Cal.App.5th 232, 241.)

---

[3] Statutory references are to the Code of Civil Procedure.

B. *The Trial Court Properly Granted Channing's Motion for Summary Judgment*

1. *The Statue of Limitations Bars Fisher's Cause of Action for Conversion*

""Conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein."" (*Professional Tax Appeal v. Kennedy-Wilson Holdings, Inc.* (2018) 29 Cal.App.5th 230, 242.) ""It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use."" (*Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 50.) Although a "'generalized claim for money [is] not actionable as conversion'" (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLC* (2007) 150 Cal.App.4th 384, 395), "when the money at issue is a specific identifiable sum held for the benefit of another that has been misappropriated, a conversion claim can be made." (*SP Investment Fund I LLC v. Cattell* (2017) 18 Cal.App.5th 898, 907.) Here, Fisher alleged Channing converted the remaining settlement funds ($40,890, after Channing's contingency fee) he claimed Channing held in trust for him.

The statute of limitations for conversion is three years. (§ 338, subd. (c).) "'[W]hen an original taking is wrongful, the statute of limitations begins to run from the time of the unlawful taking. . . . When, on the other hand, the original taking is lawful, the statute of limitations for conversion or claim and delivery does not begin to run "until the return of the property has been demanded and refused or until a repudiation of the

owner's title is unequivocally brought to [her or] his attention.'"'" (*Ramirez v. Tulare County Dist. Attorney's Office* (2017) 9 Cal.App.5th 911, 938; see *Naftzger v. American Numismatic Society* (1996) 42 Cal.App.4th 421, 429 ["In the context of a bailment, for example, if the bailee does nothing inconsistent with the bailor's right of ownership or in repudiation of that right, the bailor's cause of action for the return of the property does not accrue until the bailee *refuses a demand* to surrender the property."]; *Rose v. Dunk-Harbison Co*. (1935) 7 Cal.App.2d 502, 506 ["the statute commenced to run at the time of the refusal, which alone was the act of conversion"].) "To the extent our courts have recognized a 'discovery rule' exception to toll the statute, it has only been when the defendant in a conversion action fraudulently conceals the relevant facts or where the defendant fails to disclose such facts in violation of his or her fiduciary duty to the plaintiff. In those instances, 'the statute of limitations does not commence to run until the aggrieved party discovers or ought to have discovered the existence of the cause of action for conversion.'" (*AmerUS Life Ins. Co. v. Bank of America, N.A.* (2006) 143 Cal.App.4th 631, 639; see *Strasberg v. Odyssey Group, Inc.* (1996) 51 Cal.App.4th 906, 916.)

Before he was sentenced to prison for murder, Fisher believed Channing was holding his money in trust. Fisher stated the only reason he did not ask for the money earlier was that he "didn't need the money." The undisputed evidence showed, however, that in the early 1990s Fisher attempted to call Channing "many times" and wrote "a lot" of letters to Channing demanding the remainder of his settlement money. When asked at his deposition whether he thought the unreturned letters may have been sent to a wrong address, Fisher testified that he never

tried to confirm Channing's address, that he considered the address he had "to be the right address," and that he "took it" Channing received his letters. Based on this testimony, the trial court concluded Channing's "failure to respond to [Fisher's] demand letters . . . and [Channing's] failure to make himself accessible to [Fisher] through a working phone number for over 25 years constitute[d] either a refusal to return, or a repudiation of [Fisher's] title to, the settlement proceeds," so that Fisher's "conversion claim began to accrue and the statute of limitations began to run no later than 1993."

Fisher demanded in the early 1990s that Channing return his money. Channing's failures to respond to Fisher's inquiries, to acknowledge receipt of the letters, or to return the money put Fisher on notice at that time that Channing was refusing to comply with his demands. (See *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1240 [defendant "is liable for conversion for simply refusing to return an identifiable sum of [the plaintiff's] money"]; *Wolfe v. Willard H. George, Inc.* (1930) 110 Cal.App. 532, 535 ["[a] refusal on the part of the bailee to deliver chattels to the owner when the bailment is terminated by lapse of time or upon notice constitutes *prima facie* evidence of a conversion thereof"].) Thus, the trial court correctly ruled that the statute of limitations accrued no later than 1993 and that Fisher's lawsuit, filed 24 years later, was barred by the statute of limitations. (See *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487 ["While resolution of the statute of limitations issue is normally a question of fact, where the uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper."]; *Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, 1189 [same].)

2. *The Statue of Limitations Bars Fisher's Cause of Action for Professional Negligence*

"'The elements of a cause of action in tort for professional negligence are: (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence.'" (*Wise v. DLA Piper LLP (US)* (2013) 220 Cal.App.4th 1180, 1190.) Section 340.6, subdivision (a), provides: "An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first." The statute of limitations begins to run when the plaintiff has "reason to at least suspect" wrongdoing. (*Genisman v. Carley* (2018) 29 Cal.App.5th 45, 50.) """Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her."'" (*Id.* at p. 51.)

Fisher admits that he called and wrote Channing multiple times in 1991 and 1993 and that Channing never responded to his repeated demands for what he asserted was the remainder of his settlement money. Under these circumstances, Fisher reasonably should have suspected Channing of wrongdoing no later than 1993. Yet, Fisher did not file this action until 2017,

more than two decades later. His cause of action for professional negligence against Channing is barred under either the one-year or four-year provision of section 340.6.

Fisher argues that the statute of limitations was tolled while he was in prison and that his "survival [in prison] was of more importance" than keeping close tabs on his settlement funds. Imprisonment can indeed toll the statute of limitations, but not, as Fisher contends, indefinitely. Instead, imprisonment tolls the statute of limitations for two years during the time the plaintiff is incarcerated. (§§ 340.6, subd. (a)(4), 352.1, subd. (a); see *Austin v. Medicis* (2018) 21 Cal.App.5th 577, 589-590 ["section 352.1 applies to section 340.6 via subdivision (a)(4)," and "under section 352.1, the limitations period applicable to each of [the plaintiff's] causes of action would have been extended by two years if—*but only if*—the cause of action accrued while he was 'imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life'"].) The tolling provided by sections 340.6, subdivision (a)(4), and 352.1 still would have ended decades before Fisher filed this action.

Fisher's reliance on *Bledstein v. Superior Court* (1984) 162 Cal.App.3d 152 is misplaced. The court in that case held that an incarcerated inmate was legally disabled and that the statute of limitations on his claim was tolled during this incarceration. (See *id.* p. 171 ["[w]ith respect to retaining a tolling provision for prisoners, '[i]t would appear . . . [the Legislature] was motivated at least in part by a recognition of the practical, as well as the legal, difficulties prisoners face in instituting and prosecuting suits'"].) *Bledstein* involved former section 352, subdivision (a)(3), which stated: "If a person entitled to bring an action, mentioned in Chapter 3 of this title, be, at the time the cause of action

accrued . . . [i]mprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life, the time of such disability is not a part of the time limited for the commencement of the action." (*Bledstein*, at p. 157, italics omitted.) But the Legislature changed that law. "In 1994, the Legislature abrogated subdivision (a)(3) of section 352 and enacted section 352.1, which constitutes a modified tolling provision for prisoners." (*Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 569, fn. 5.) And section 352.1 limits the tolling provision to two years for inmates.

3. *The Statue of Limitations Bars Fisher's Cause of Action for Breach of Fiduciary Duty*

"[A]ttorneys owe a fiduciary duty of the highest character to their clients." (*Oliveira v. Kiesler* (2012) 206 Cal.App.4th 1349, 1359; see *Bird, Marella, Boxer & Wolpert v. Superior Court* (2003) 106 Cal.App.4th 419, 430.) "In this context, a 'professional obligation' is an obligation that an attorney has by virtue of being an attorney, such as fiduciary obligations, the obligation to perform competently, the obligation to perform the services contemplated in a legal services contract into which an attorney has entered, and the obligations embodied in the Rules of Professional Conduct." (*Lee v. Hanley*, *supra*, 61 Cal.4th at p. 1237.)

Generally, when breach of fiduciary duty "'amount[s] to a claim of professional negligence,'" the statute of limitations for professional negligence will apply. (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1479; see *Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145, 1159 [where "the complaint

shows that the allegations of professional negligence subsume all of the allegations for breach of fiduciary duty," the defendant "cannot prolong the limitations period by invoking a fiduciary theory of liability"]; *Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 68 ["[s]ince most claims for breach of fiduciary obligations can be restated as a claim for attorney malpractice, and since the fiduciary obligations here arose out of the attorney-client relationship, . . . section 340.6 applies to such claims"]; *Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, 1363 ["the statute of limitations within which a client must commence an action against an attorney on a claim for legal malpractice or breach of a fiduciary duty is identical"]; see also *Lee v. Hanley*, *supra*, 61 Cal.4th at p. 1239 ["If the facts stated in the complaint show that the basis for the plaintiff's conversion claim is that an attorney provided deficient legal services, then the plaintiff's claim will depend on proof that the attorney violated a professional obligation in the course of providing professional services."].) For other breach of fiduciary duty claims, "[t]he statute of limitations . . . is three years or four years, depending on whether the breach is fraudulent or nonfraudulent." (*American Master Lease LLC*, at p. 1479; see *Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 963 [same].)

Here, it makes no difference whether the applicable statute of limitations is the one-year/four-year period in section 340.6 or the three-year/four-year period for breach of fiduciary causes of action. Even under the longest possible limitations period of four years, Fisher was on inquiry notice of his causes of action against Channing no later than 1993. At a minimum, Fisher knew enough about his causes of action years (if not decades) ago to

begin an investigation into the whereabouts of Channing and the status of the funds Fisher now claims Channing was withholding from him. This is true even though, as Fisher emphasizes, Channing owed him a fiduciary duty as his attorney. "The existence of the fiduciary relationship limits the plaintiff's duty of inquiry by eliminating the plaintiff's usual duty to conduct due diligence, but it does not empower that plaintiff to "'sit idly by'" when ""facts sufficient to arouse the suspicions of a reasonable [person]"" "'come to his [or her] attention.'"" (*Ferguson v. Yaspan* (2014) 233 Cal.App.4th 676, 683; see *Stella v. Asset Management Consultants, Inc.* (2017) 8 Cal.App.5th 181, 197, fn. 13 ["[w]hile it is true a plaintiff's burden of discovery is reduced when he or she is in a fiduciary relationship with another individual [citation], 'even assuming for the sake of argument that each of the [defendants] had a fiduciary duty to plaintiffs, this does not mean that plaintiffs had no duty of inquiry if they were put on notice of a breach of such duty'"]; *Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 176-177 [plaintiff has "'a duty to investigate even where a fiduciary relationship exists when "he has notice of facts sufficient to arouse the suspicions of a reasonable man"'"].)

DISPOSITION

The judgment is affirmed. Channing is entitled to recover his costs on appeal.

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, J.